92-386

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STEPHEN FISHER,

Petitioner,

vs.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TAX APPEALS TRIBUNAL and JAMES WEXLER, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondents.

Petition For Writ Of Certiorari To The New York State Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

STEPHEN FISHER
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QUESTIONS PRESENTED

1. Whether a state government agency's failure to conduct an administrative hearing in accordance with procedures required by state statutes violate petitioner's procedural due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether the decisions of the courts below, as a matter of law, are in direct and irreconcilable conflict with this Supreme Court's explicit standards as set forth in numerous decisions that mandate state agencies to conduct administrative hearings in strict compliance with the procedural requirements of the state statutes.

PARTIES

All parties to this case are listed in the caption.

As always, petitioner Stephen Fisher is appearing pro se. He is not an attorney and has never formally studied law.

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OF TAXATION AND FINANCE,
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PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

OPINIONS BELOW

The transcript of petitioner's December 14, 1989 New York State Department of Taxation and Finance administrative hearing appears in Appendix A, pg. 1a.

The April 19, 1990 decision of the New York State Department of Taxation and Finance, Tax Appeals Tribunal was not reported and appears in Appendix B, pg. 33a.

The November 21, 1991 decision of the New York Supreme Court, Appellate Division was not reported and appears in Appendix C, pg. 61a.

The orders of the New York Court of Appeals dated Feburary 25, 1992 and June 4, 1992 were not reported and appear in Appendix D, pg. 67a and Appendix (hereinafter, "App.") E, pg. 68a respectively.

JURISDICTION

The order of the New York Court of Appeals was dated and entered on June 4, 1992. This petition for writ of certiorari will have been filed in this Court before the expiration of 90-days from June 4, 1992.

This Court's jurisdiction is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix H.

Amendment XIV to the United States Constitution is set forth in Appendix H.

Appendix H begins on page 74a.

STATEMENT OF THE CASE

In October, 1989; the Chief Administrative Judge of the New York State Department of Taxation and Finance (hereinafter, "Tax Department"), acting in response to petitioner's request, issued subpoenas for witnesses to appear at petitioner's tax hearing.[1]

1. The 1989 tax hearing focused on petitioner's 1977 taxes. The origin of this 1989 hearing can be traced back to petitioner's original 1981 petition and the Tax Department's original 1981 answer dealing with the results of a 4-year (1975/1976/1977/1978) tax audit. In 1981, after rejecting every pleading law/regulation /decision ever written; the Tax Department arbitrarily threw-out the 1981 4-year petition and 4-year answer while unilateraly conducting (in 1981) a 1-year (1975) hearing. This abuse of power is summariazed in a memo (App. F, pg. 69a) written by a Tax Department attorney:

> "The petition of Mr. Fisher addressed all these years [1975/1976/1977/1978], as did our answer. Tax Appeals Bureau scheduled a hearing on the 1975 taxes only." (Record on Appeal, pg. 72)

In the instant action; the 1989 hearing on 1977 taxes is the result of the petitioner's never -ending struggle to achieve a full and fair hearing on the basis of the original 1981 4-year petition and 4-answer.

The nine subpoenas relating to the 1989 tax hearing were served on the potential witnesses who had in-depth hands-on personal knowledge of petitioner's tax matters. Thereafter, the Tax Department submitted a motion to quash supboenas.

Presiding Administrative Law Judge Robert Mulligan ruling in the court of original instance (i.e., at petitioner's December, 1989 tax hearing pertaining to 1977 taxes) clearly defined the meaning and purpose of straight-forward State Statutes as he rejected the Tax Department's motion to quash subpoenas.

> "What I have in mind is Section 2304 of the Civil Practice Law and Rules, which provides that . . . If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the [New York] Supreme Court.

"I will also point out that the New York Practice Encyclopedia Volume 2nd, Section 54:72 provides that 'if the subpoena is not returnable in a court, a request to withdraw or modify the subpoena must first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in [New York] Supreme Court.'

"For the petitioner's benefit, I will point out Section 7308 of the Civil Practice Law and Rules which provides that -- this is in Subdivision B nonjudicial -- 'unless otherwise provided, if a person fails to comply with a subpoena which is not returnable in the court, the person or the petitioner shall move in the [New York] Supreme Court.'"

Quoted from the December 14, 1989 tax hearing transcript (App. A, pg. 10a thru pg. 13a)

The basis for Judge Mulligan's complete reliance on New York's Civil Practice Law and Rules (hereinafter, "CPLR") § 2304 and § 7308 is supplied by the New York State Tax Law § 2006.10:

> "A subpoena issued under this subdivision shall be regulated by the Civil Practice Law and Rules."

After denying the motion to quash subpoenas, Judge Mulligan recessed the tax hearing so as to provide the respondents an opportunity to submit their motion in New York Supreme Court.

One of the nine subpoenas was served on a New York State assistant attorney general who had conducted research into petitioner's tax matters — the other eight subpoenas were served on Tax Department officials who had been personally involved in petitioner's decade-old tax controversy.

Following the crystal clear mandates of the CPLR; the assistant attorney general submitted a motion to quash his subpoena in New York Supreme Court. And, in accordance with Judge Mulligan's

directions, the petitioner submitted a motion to enforce subpoenas in New York Supreme Court.

But, entirely ignoring Judge Mulligan's unmistakable instructions; the Tax Department respondents spurned the controlling statutes (Tax Law § 2006.10 and CPLR § 2304) while following a never-before-used appeal procedure. The respondents submitted a "Notice of Exception" to the Tax Department's Tax Appeals Tribunal (hereinafter, "Tax Tribunal) asking that the subpoenas be quashed.[2]

---

2. Emphasizing the unique "first impression" nature of the action, the Tax Tribunal decision states (App. B, pg. 44a);

> "This is the first case involving the issuance of subpoenas by the Tribunal and the authority of the Tribunal to rule on motions to withdraw subpoenas it has issued."

On April 19, 1990; after refusing petitioner's request for oral argument; the Tax Tribunal rendered its decision (App. B, pg. 33a) of "first impression" that quashed the subpoenas.[3]

After being advised of the Tax Tribunal's independent action in quashing subpoenas, the New York Supreme Court dismissed both the assistant attorney general's motion to quash his particular supboena and the petitioner's motion to enforce subpoenas.

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3. After receiving correspondence from the Tax Department claiming that the Tax Tribunal decision had quashed all of the nine subpoenas; the petitioner wrote the Tax Tribunal requesting some form of clarification. Petitioner had read (and reread) the decision and concluded that eight subpoenas had been quashed. In response to petitioner's request, the Tax Tribunal sent a letter (App. G, pg. 72a — Supplemental Record, pg. 58) advising petitioner to start a law suit in a New York Court if he wanted to understand the meaning of the decision!

To this day; the petitioner does not know if eight or nine supboenas have been quashed.

Petitioner appealed the Tax Tribunal's decision quashing subpeonas to the New York Supreme Court, Appellate Division, 3rd Department. In a November 21, 1991 decision (App. C, pg. 61a); the Appellate Division upheld the Tax Tribunal rulings.

Subsequently, the New York Court of Appeals first turned-down petitioner's request for permission to appeal on constitutional grounds in a February 25, 1992 order (App. D, pg. 67a) — soon thereafter (on June 4, 1992), the same Court of Appeals denied the petitioner's motion for leave to appeal (App. E, pg. 68a) in determinations that have the unquestionable end-result of flat-out repudiating the controlling statutes.

The respondents correctly identify the petitioner's early position in definitely establishing the critical federal procedural due process question:

> "Petitioner seeks review of this [New York Court of Appeals] Court on his incorrect assumption that the Tribunal, in quashing the subpoenas initially issued by an [Administrative Law Judge] ALJ, was acting outside it jurisdiction and contrary to the statutory scheme. He [the petitioner] presented this argument to the Appellate Division, which correctly rejected it."
>
> Excerpt from respondents' March 26, 1992 Memorandum of Law (page 5) submitted to the New York Court of Appeals

At the very least, the Tax Tribunal gave passing acknowledgement to Judge Mulligan's ruling that has served as petitioner's core argument throughout all stages of the instant controversy.

> "CPLR section 2304 provides . . . if the subpoena is not returnable in a court, . . . 'a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the [New York] supreme court.'"
>
> Tax Tribunal Decision; App. B, pg. 47a

While there is absolutely no indication in any New York Law and/or while there is absolutely no indication in any New York court decision that could conceivably supply credibility to the Tax Tribunal's involvement in the quashing of non-judicial subpoenas; the lower courts' rulings in the instant action inexplicably give blind affirmance to the Tax Tribunal's determinations that quashed the non-judicial subpoenas as if Tax Law § 2006.10, CPLR § 2304; Judge Mulligan and the New York Supreme Court do not exist.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two related reasons. First, the failure of the Tax Department to conduct hearings in accordance with the procedural requirements of the New York Tax Law § 2006.10 and New York Civil Practice Law and Rules § 2304 represents a violation of petitioner's right to due process of law under the Fifth and Fourteenth amendments of the United States Constitution. Second, New York State courts' rulings are in direct and irreconcilable conflict with the decisions of this Court that mandate state government agencies follow procedures in compliance with the controlling state statutes.

The New York courts and the Tax Tribunal certainly cancelled-out the statutes (Tax Law § 2006.10 and CPLR § 2304) by ruling that the Tax Department could (for the first time) submit its motion to quash subpoenas to the potentially biased, in-agency Tax Tribunal. The Tax Department severely abused its discretion and acted well beyond its delegated powers by taking such arbitrary and capriousious actions that were contrary to the prohibitions of the Tax Law and CPLR which required open New York Supreme Court review after a motion to quash subpoenas had been rejected in the administrative hearing forum.

The Denial Of Procedural Due Process Rights As Defined In The Constitution

The important connection between state

law, and due process, and the United States Constitution was explained last century by Chief Justice Fuller in In Re Kemmler, 136 U.S. 436, 448 (1890):

> "As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundemental principles of liberty and justice which lie at the base of all civil and political institutions."

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 679-680 (1929) extended the precept that procedural due process logically requires all agents of state government to adhere with state law when the Court concluded in reference to a due process violation occuring via judicial construc-

tion of an otherwise valid state statute that "the federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branches of government."

More recently, Justice Blackmun writing in Kentucky Dept. of Detention v. Thompson, 490 U.S. 454, 460-461 (1989) underscored Fourteenth Amendment procedural due process requirements of complying with state statutes:

> "[p]rotected liberty interests 'may rise from two sources — the Due Process Clause itself and the laws of the States'.
>
> and
>
> "and our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations."

Justice Blackmun went on to note a previous decision of the Court holding

that the state is bound by the requirements and procedures of its own statutes. See 490 U.S. at 463, citing Board of Pardons v. Allen, 482 U.S. 369, 377-378 (1987).

In 1990, Justice Blackmun, again speaking for the Court, wrote that a state must comply with their own statutorily mandated procedural safeguards. Zinermon v. Burch, 494 U.S. 113 held that petitioner Burch had a complaint sufficient to establish a claim because state authorities failed to follow the state's validly enacted statutory procedural requirments.[4]

4. The statutory mandates in the instant action are inscribed in CPLR 2304 that requires requests to quash non-judicial subpoenas to be first submitted to the persons who originally issued the subpoenas — thereafter, motions to quash must be submitted in New York Supreme Court (please refer to page 5 of this petition).

If the state legislature had other intentions regarding procedures required for quashing non-judicial subpoenas; the state legislature would have then enacted new laws (which it has not).

Justice Blackmun's analysis in Zinermon focused on the procedural requirements that must be followed by state agencies. The Zinermon decision indisputably ruled that when a state fails to comply with their own statutory procedural due process requirements, they have violated the Fifth and Fourteenth Amendments. Justice Blackmum described the basis for such a conclusion:

> "The State delegated to [state officials] the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement.
>
> and
>
> "[t]he deprivation here is 'unauthorized' only in the sense that it was not an act sanctioned by state law, but, instead, was a 'depriv[ation] of constitutional rights. . . by an official's abuse of his position'." 494 U.S. at 138, citing Monroe v. Pape, 365 U.S. 167, 172

It could be argued that prisnors

and mental patients present a different perspective for due process rules and laws; however, Wilner v. Committee on Character, 373 U.S. 96 (1963) unqualifiedly sets-in-place all Fifth and Fourteenth Amendments due process rights in the administrative hearing scheme of justice. Additionally, the Wilner, supra. case demonstrates that the instant action is not the first time that this Supreme Court has confronted a New York Court of Appeals decision that had previously rejected procedural due process arguments. In the Wilner, supra. decision, the New York Court of Appeals ruled against the petitioner who claimed he was deprived of procedural due process in an administrative hearing:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, vis: Appellant contended that he was denied due process of law in violation of his

> constitutional rights under the Fifth and Fourteenth Amendments of the Constitution. The [New York] Court of Appeals held that appellant was not denied due process in violation of such constitutional rights."
>
> Willner v Committee, 373 U.S. 96, 102

BUT, the U.S. Supreme Court decisively overturned the decision of the New York Court of Appeals:

> "Here we are not concerned with grounds which justify denial of a license to practice law, but only with what procedural due process requires if the license is to be withheld.
>
> and
>
> "Yet, '[t]he requirements of fairness are not exhausted in the taking or consideration of evidence but extend to concluding parts of the procedure as to the beginning and intermediate steps. Id., at 20 Cf. Gonzales v. United States 348 U.S. 1, 18-19"
>
> Wilner v Committee, 373 U.S. 103, 105

The instant action is not concerned with the relevancy/legality of the subpoenas. Yet, once the administrative law judge rejected the Department of Taxation motion

to quash subpoenas; the only "beginning and intermediate steps" available to the Department of Taxation were defined in the Tax Law § 2006.10 and the CPLR § 2304 which mandated that the Tax Department motion to quash must then be made in a court of law (i.e., the State Supreme Court) NOT within a potentially biased, closed, untested Tax Tribunal. This Supreme Court concluded the Wilner, decision by ruling:

> "We hold that the petitioner was denied procedural due process . . . [New York Court of Appeals decision is] Reversed"

The Irreconcilable Conflict With Numerous Decisions Of This Court

The arbitrary and unauthorized actions of the Tax Tribunal stand in stark conflict with this Supreme Court's definition of "due process of law" as found in the Fifth and Fourteenth

Amendments. Writing in Daniels v. Williams, 474 U.S. 327 (1986), Justice Rhenquist explained that the Law must protect an individual from the arbitrary conduct of government officials.

> "[t]his history reflects the traditional and common-sense notion that the Due Process Clause, like its forebearer in the Magna Carta [citations omitted], was "'intended to secure the individual from the arbitrary exercise of the powers of government'". 474 U.S. at 331 (citing Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okley, 4 Wheat. 235, 244 (1819))

This Court has stated on numerous other occasions that arbitrary and unauthorized actions by government officials and agencies violate the procedural components of the Fifth and Fourteenth Amendments' due process of Law requirements. See Slochower v. Board of Education, 350 U.S. 551, 559 (1956) ("' protection of the individual

against arbitrary action' characterized 'as the very essence of due process'".); Boddie v. Connecticut, 401 U.S. 371, 380 (1971) ("The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather the State owes to each individual that process which, in light of the values of a free society, can be characterized as due."); Wolf v. McDonnell, 418 U.S. 539, 558 (1973) ("We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is the protection of the individual against arbitrary action of government.")

Additionally, the rulings of the New York Courts are in conflict with this Court's decisions such as Wilner, supra. and Witchita Railroad & Light Company v.

Public Utilities Commission of the State of Kansas et. al. 260 U.S. 48 (1922).

Finding that the Public Utilities Commission failed to make a statutorily required finding of fact, the Witchita court held that such a failure rendered void a decision by the commission adjusting rates charged to the Witchita Railroad & Light Company. In so holding, the Witchita, supra. decision stated that in accord with "general principles of constitutional government":

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it [the administrative agency] a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action." 260 U.S. at 58-59

In the instant action, the conflict between the New York Courts' decisions and this Court's Witchita ruling is quite obvious. The New York Courts, in failing to overturn the Tax Tribunal that acted contrary to the specific rules and procedures established by the statutes; have placed themselves directly at odds with the concise mandates of this Court that have determined that a State administrative agency's actions are void unless in accordance with the validly enacted laws which apply to their procedural practices. Also see: Wilner, supra.; Zinermon, supra.; Kimmler, supra. Daniels, supra.; Anti-Fascist, supra; — the core conflict between the New York Courts and this Court rests in theory, substance and the application of the Law.

This Court has continued to demonstrate its adherence to the principle it stated in Witchita that an administrative agency is bound to conduct itself in accord with the procedural requirements of the state or federal law which applies to its functions. See Mahler v Eby 264 U.S. 32, 44 (1923) (the conclusion that a state administrative agency must abide by state statutes rests "not only on the language of the statute but also on general principles of constitutional government"); Panama Refining Co. v. Ryan, 293 U.S. 388 432-433 (see also J. Cardozo dissenting 293 U.S. at 447-448 "[i]f legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled."); United States v. Baltimore & Ohio Railroad Co., 293 J.S.

454, 463-464 (ICC order void for failure to make finding of fact as required by statute.); Pacific States Co. v. White, 296 U.S. 176, 186 (1935) Had state statute required special findings, such findings would have been a requirement under Witchita.)

In the annals of American recorded law; this Court has never as much as implied that a state agency is empowered to ignore statutes while carrying out delegated functions. Put in other words, it would be impossible for the respondents to offer a precedent that would provide an iota of historical credibility to their actions in disregarding the controlling statutes while unilaterally quashing subpoenas in the instant case.

The Impact Of The Goldberg v. Kelly Decision In The Context Of This Court's Witchita Determinations

In the important due process decision of Goldberg v. Kelly, 397 U.S. 254 (1969); this Court's concluding paragraph started-off by explaining that administrative hearings "must rest solely on the legal rules". Thereafter, the pivotal Goldberg decision relied on the Witchita findings to support its determination that administrative proceedings cannot merely reach groundless conclusions.

> "To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and and indicate the evidence he relied on, cf. Wichita R. & Light Co. v. PUC, 301 U.S. 292 (1937)." 397 U.S. 271

New York Tax Law § 2006.10 matter-of--factly states:

> "A subpoena issued under this subdivision shall be regulated the Civil Practice Law and Rules."

And, New York Civil Practice Law and Rules § 2304 just as matter-of-factly states:

> "If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix condiitons or modify may thereafter be made in the [New York] Supreme Court."

In terms of the Goldberg decision — what are the "reasons" for the Tax Tribunal actions that effectively renounced the statutes as this administrative agency arbitrarily assumed the sole responsibility for quashing the subpoenas (acting as if the New York Supreme Court did not exist)? Where in the statutes is a mere indication that the Tax Department may submit a motion to quash subpoenas to the Tax Tribunal?

The Tax Tribunal abused its discretion and acted well beyond its delegated powers when undertaking a deliberate course-of-action that was contrary to the mandates of the controlling statutes. In the instant circumstances, the fundemental principle that explicitly requires all legal proceedings to be governed by the "rule of law" cannot escape the scrutiny of this Supreme Court.

The Essence Of Due Process

Even assuming arguendo that the subpoenas in the instant action should be

quashed for any reasons whatsoever; the power and force of petitioner's unqualified right to due process would still compel the government agency to act in strict compliance to the procedural rules embedded in the statutes.

> "The right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions" Carey v. Piphus, 435 U.S. 247, 266 (1978)

Justice William O. Douglas may have best explained the underlying procedural due process standards and guidelines:

> "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." Anti-Fascist Committee v. McGrath 341 U.S. 123, 179 (1951) (J. Douglas concurring opinion)

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.[5]

Dated: August 23, 1992

Respectfully submitted

STEPHEN FISHER
Petitioner, pro se

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5. If this Court elects not to address the issues presented in the writ at the present time, it is requested that the writ issue and that the matter be remanded to the New York Court of Appeals for redetermination in light of this Court's opinions in Witchita, supra.; Wilner, supra.; Carey, supra.; Anti-Fascist Committee, supra.; Daniels, supra.; Kemmler, supra.; and Zinermon, supra.

APPENDIX

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition
of

Stephen and Nanci Fisher

for Redetermination of a Deficiency /Revision of a Determination or for Refund of Personal Income Tax Under Article 22 of the Tax Law for the Years 1977 and 1984

DATE: Thursday, December 14, 1989

LOCATION: Two World Trade Center
New York, New York 10047

TIME: 1:30 p.m. - 2:15 p.m.

BEFORE: ROBERT F. MULLIGAN, ESQ.
Administrative Law Judge

REPORTED
BY: Mary Margaret Donavan

A P P E A R A N C E S

AUDIT DIVISION BY:

ANDREW ZALEWSKI, ESQ.

PETITIONER:

Stephen Fisher
401 East 80th Street
Apartment 9C
New York, New York 10021

Also Present:
Melvin Rubenstein, Tax Technician II

ADMINISTRATIVE LAW JUDGE: The Division of Tax Appeals calls the matter of petition of Stephen and Nanci Fisher.

This is a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977 and 1984.

I am Robert F. Mulligan, appointed by the Division of Tax Appeals as an administrative law judge for this proceeding.

Now I will note a number of things. First of all, it appears that the petitioner has obtained subpoenas naming nine individuals who appear to be either employees of the Department of Taxation and Finance or the Attorney General. A motion has been made by the Department of Taxation to quash the subpoenas.

Mr. Zalewski, did you provide any of the persons named in the subpoena? I see you have a gentleman with you today.

MR. ZALEWSKI: This gentleman is Mr. Melvin Rubenstein, who is not an individual that was subpoenaed.

May I be heard with respect to our motion?

ADMINISTRATIVE LAW JUDGE: Yes, I was just going to ask you to make your argument on the motion.

I want to make clear, first of all, who is present today and who is not. I will also note that at 1:15 today a person identifying herself as Rosalie Hronsky, Assistant Attorney General, appeared here at our offices and stated to me that Mr. Feightkou [phonetic] would not be appearing.

I also want to state that just before lunch time today, I was advised that Mr. Feightkou has made a motion in the Supreme Court of the State of New York, County of New York requesting the Court to quash the subpoena served upon him. And that brings us to where we are today. I understand that that motion was served yesterday afternoon, but I was not aware of it until late this morning.

MR. FISHER: Served who on; myself? When you say "served" --

ADMINISTRATIVE LAW JUDGE: No. It was served on the Tribunal.

MR. FISHER: This is the first I heard of it.

ADMINISTRATIVE LAW JUDGE: I don't see your name on this document, sir. It says to the State of New York Tax Appeals

Tribunal. That is the only person the body indicates.

I have made a couple of copies. I will give you one and I will give one to Mr. Zalewski.

MR. FISHER: Don't I have an opportunity to respond to that? Doesn't that have to be served on me? It seems very odd.

ADMINISTRATIVE LAW JUDGE: I am not going to advise you. I am just pointing out to you that your name does not appear on there. It does indicate a court date.

I also wonder if it should be in the Supreme Court, New York County. Perhaps it should be in Albany County, and I will explain the reasons later on.

And as I said, that brings us to where we are today. We have learned who is here

and who is not here, and at least the reason for Mr. Feightcou not being here.

Alright, Mr. Zalewski, state your argument as to the motion.

MR. ZALEWSKI: Thank you.

Initially I would ask that we be allowed to amend our motion, as we have not addressed the subpoena that was issued to Commissioner Wetzler, and we would ask that our application also apply to him.

I think our moving papers speak for themselves. We have attempted to outline the issues that are involved at the hearing today with respect to tax year 1977 and the tax year 1984.

Mr. Fisher's subpoenas appear to be directed specifically to 1977, so I will focus on that at this point. Initially, and as pointed out in the papers that are part of our motion, Mr. Fisher submitted a

1977 return wherein he claimed a refund of approximately $1300. As a result of audit adjustments by the Audit Division, his refund was substantially reduced to approximately $200. The refund that he was afforded for this year was later applied to deficiency owed for 1976.

The reason why the Audit Division disallowed in part his 1977 refund relates to certain Schedule C expenses he claimed for 1977, and these are the bills, expenses incurred in connection with a business referred to as Fisher Associates on the Schedule C. Attached to my affidavit are the auditor's notes wherein he explains his reasons for disallowing the Schedule C loss for that year.

With respect to 1977, the issue concerns Mr. Fisher's tax as computed pursuant to Section 654 of the Tax Law,

which required that anyone who filed nonresident returns pay tax that would be no less than if they filed on a single return.

ADMINISTRATIVE LAW JUDGE: That is 1984 you are talking about?

MR. ZALEWSKI: Right, tax year 1984.

Now in reviewing the issues, the Law Bureau, in counsel to the Department of Taxation and Finance, believes that none of the individuals from the Division of Tax Appeals who were issued subpoenas will be able to offer testimony that is relevant to the hearing today.

I would note that these are nonjudicial subpoenas, which in my understanding would have to be enforced through a proceeding in the Supreme Court.

I think I have outlined our position today. Again, I would ask that you treat

our application as applied to Commissioner Wetzler as well as the individuals that are mentioned in our motion papers.

I would at this time like to submit an additional exhibit for our papers. It is a copy of the subpoenas and the expense fees paid to the individuals who were served up in Albany. And when I say "served," these subpoenas were sent to my office, so I have no knowledge as to how they were actually served on the department. But I think the subpoenas themselves are relevant, as well as the fees which were paid, which appear to be insufficient at this point, to my knowledge.

It is my understanding that the petitioner had to pay an appearance fee of $15, as well as 23 cents a mile round trip. And according to my calculations,

he underestimated by approximately $20 for each individual. And we would raise that as an issue as to whether these subpoenas should be quashed today.

Your Honor, I would like to offer subpoenas that came into my possession for the following individuals: Michael Alexander, James Morris, James Wetzler, John Langer, Barbara Burkett and Barry Bressler.

ADMINISTRATIVE LAW JUDGE: Why don't you hold onto them for a minute?

MR. ZALEWSKI: Okay.

ADMINISTRATIVE LAW JUDGE: Is there anything else?

MR. ZALEWSKI: No. That completes my argument, your Honor.

ADMINISTRATIVE LAW JUDGE: First I have a jurisdictional problem that I would like to get out of the way. What I have

in mind is Section 2304 of the Civil Practice Law and Rules, which provides that "A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the Supreme Court. Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify."

I will also point out that the New York Practice Encyclopedia, Volume 2nd, Section 54:72 provides that "If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena must first be made to the person who

issued it and a motion to quash, fix conditions or modify may thereafter be made in the Supreme Court."

The observation made is that "A motion to quash a subpoena issued by a nonjudicial officer is akin to an Article 78 proceeding, is a special proceeding and should be brought in the county in which an Article 78 proceeding would be appropriate." And it goes on to cite a case.

So this leads me to believe that if you want to have a subpoena quashed, you have to go to the Supreme Court to have that done.

However, petitioner also has a problem, because I think, as you pointed out in your argument, Mr. Zalewski, to have a nonjudicial subpoena enforced, someone has to go to court. For the

petitioner's benefit, I will point out Section 7308 of the Civil Practice Law and Rules of which provides that -- this is in Subdivision B nonjudicial -- "unless otherwise provided, if a person fails to comply with a subpoena which is not returnable in the court, the person or petitioner shall move in the Supreme Court. If the court finds that the subpoena was authorized," and it continues.

So it is my belief, unless you can point out something to the contrary, that I can neither quash the subpoenas nor enforce the subpoenas. One thing I may suggest since we are here today, and except for reading the motion papers, I have no knowledge of the controversies. I think I can see what the controversy is from the motion papers; however, for the

petitioner's benefit, I would like to point something out. These are administrative hearings, and our authority is rather limited. I think we have got both notices of deficiency and claims of refund involved; is that correct?

MR. ZALEWSKI: That is correct.

ADMINISTRATIVE LAW JUDGE: Our authority is to review the deficiency and the notice of deficiency, and it is also to review a denial of the claim for refund. We don't have the authority that a court would have.

I note that some of the material in the motion papers -- and again, Mr. Fisher, this is just for your benefit, and I don't know whether eventually I will be the person who hears the case or it could be someone else -- but under Section 89e of the Tax Law, the petitioner has the

burden of proof in most cases. Unless there is a fraud, penalty or a change in the deficiency or increase of the deficiency after it has been issued and some other circumstances, the burden of proof is on the petitioner. I think you are probably aware of that, and I mean this as a way to put you on the right track to proving your case.

I did see in the motion papers that one of the things that is in issue is the substantiation of deductions taken under Schedule C for 1977; is that correct?

MR. FISHER: I believe so. I am not sure what you are referring to.

ADMINISTRATIVE LAW JUDGE: Okay. I think it appears that you are interested in statements that people may have had or comments that people made. But in my opinion, it is going to come down to your

proving your deductions for 1977. One of the issues, anyway.

MR. FISHER: One of the issues, absolutely. It's one of the issues.

ADMINISTRATIVE LAW JUDGE: So you are going to have to show that.

MR. FISHER: I think penalties and interest happens to be another key element as far as '77 and '84.

ADMINISTRATIVE LAW JUDGE: Alright. I saw another comment in there that I think you feel the State delayed over a long period of time, but I also see in the motion papers that a conference was scheduled and a default order was issued.

MR. FISHER: That is what you call a misstatement. That's one of the reasons why got to court to get them enforced.

MR. ZALEWSKI: If I may respond to that. Mr. Fisher is not an attorney. He

has to presumptive right to issue subpoenas himself. Therefore, as we say in the motion papers, it is our belief that the regulations for the Tax Appeals Tribunal would allow the issuance of subpoenas only in circumstances where the Division of Tax Appeals makes the determination that the individuals have some relevance to the proceeding. I think that is the underlining reason for the regulation itself, to ensure that controversies are resolved quickly.

May I suggest that Mr. Fisher make some kind of offer of proof today with respect to the individuals that are subpoenaed. If such an offer meets with your approval, then I would suggest that it would be up to you to consider whether this matter should continue to allow the

issuance of the subpoenas if you determine that they should not be withdrawn.

ADMINISTRATIVE LAW JUDGE: I hate to differ with you, and I hate to pass the buck, but I don't feel I have the authority to quash the subpoenas.

I want suggest something today. Being that we are here today; and if both of you agree, we can start the case, and we could take in the jurisdictional papers so I can find out in an organized way what the case is about, the case itself. At that point we can adjourn the case where this could be explored, and Mr. Fisher can go to court and get the subpoenas enforced. If you want them quashed, you can do so.

I also point out we have a Notice of Motion served on the Tribunal stating that a hearing is going to be held January 10,

1990, 9:30 a.m. in the Supreme Court of New York County.

So I think the only thing we can do today is to proceed, take in the jurisdictional papers, go as far as we can, and then continue the case. The only other alternative I would say is to adjourn the case until these things are resolved.

MR. ZALEWSKI: The Division of Taxation requested some decision be made on whether these subpoenas should be withdrawn. I am not sure if that is implied into what you are telling me; but so far no one has communicated with our office to explain whether they will withdraw the subpoenas, and that is a prerequisite in making a motion to quash under Section 2304.

ADMINISTRATIVE LAW JUDGE: Did you ask Judge Coriglino or Judge Marcasse?

MR. ZALEWSKI: Actually the people who issued the subpoenas were Daniel Ranalli and Andrew Marcasse, who I believe is the Chief Administrative Law Judge. I have copies of correspondence.

ADMINISTRATIVE LAW JUDGE: Let me see the subpoenas, please.

MR. ZALEWSKI: I don't believe you can make out the names on here.

MR. FISHER: I have copies.

ADMINISTRATIVE LAW JUDGE: Just show them to me, please.

ADMINISTRATIVE LAW JUDGE: I see that the subpoena to Commissioner Wetzler is signed by Daniel J. Ranalli, Assistant Chief Administrative Law Judge. And the others appear to be signed by Andrew Marcasse, Chief Administrative Law Judge.

What we can do in the interim is that if you want to, in lieu of going to court, if you want to submit a memorandum to me showing me I have the jurisdiction to do that, I would be willing to entertain it; but based on what I have seen so far, I do not feel I have jurisdiction, just as I wouldn't have jurisdiction to order these people to be here or hold them in contempt. I can't do that. Only a court can do that.

MR. ZALEWSKI: Again, I guess my question is a request that the subpoena be denied today.

ADMINISTRATIVE LAW JUDGE: If it is being made to me, I am denying it, yes.

MR. ZALEWSKI: Thank you.

ADMINISTRATIVE LAW JUDGE: Mr. Fisher, I will hear what you have to say.

MR. FISHER: I think I am known in my company as talking too much. Maybe it would be best for me to be quiet.

I will say this: I can't continue the case without witnesses. You have pulled up several points already that will highlight the need for testimony or supporting testimony or testimony from the people who were involved with the decisions. So I have absolutely no chance whatsoever of providing an intelligent, forceful, worthwhile case on my behalf without calling witnesses. This is why I went to the effort and energy of having subpoenas issued. So I could not even entertain the idea of going forward without the opportunity to try and enforce it.

I was of the opinion -- and again my legal background is quite limited in very

isolated, various different areas -- but I was of the opinion that when a subpoena is issued, until it is quashed, someone has to go somewhere. They can't just decide among themselves. Here is the Law Bureau of the State of New York Government getting together and saying: Okay, we don't have to go. That is against the law. The law says right here on the thing you have to go. They weren't quashed yet. They were served properly. I had all the proper documents at great expense served. How dare these people say I am not going and don't go. If I were served with the subpoena, I would go. I wouldn't make that arbitrary decision.

And if you really want to see the real gut level of my case, and this has been going on for nine years, these people develop a law unto themselves. If they

were complying with the law, the law states they be here. If they were quashed, they don't have to testify; but they don't have that authority or that flexibility not to be here. And that is very upsetting that the government would act this way.

In that I am talking, I might as well just continue. I don't even think, again from my limited exposure to the law, that this hearing, based on the Tribunal's own Rules of Practice and Procedure, could rightfully even consider this motion as such in this Section 3005 of the Rules of Practice and Procedure. This is what was sent to me, and I would like to just give that to you. I was sent a State of New York Department of Taxation and Finance Tax Appeals Tribunal Rules of Practice and Procedure. It is a 45-page document. It

very clearly and in layman's terms says how to handle motions. And it states on page 15 -- and I will give a copy to the attorney -- the return date which a motion will be considered by the Administrative Law Judge designated by the Supervising Administrative Law Judge must be at least 30 days after the date of notice of the motion.

The date of this motion happens to be November the 20th, which is 24 days ago. If it is 24 days ago, and this very clearly says 30 days, I am here for a hearing. I have subpoenaed my witnesses. Their motion was not prompt. In CPLR 2325 there was a recent case in the New York Court of Appeals -- I think that is what it is. What is the highest court? Whatever the highest court is.

ADMINISTRATIVE LAW JUDGE: Court of Appeals.

MR. FISHER: And it says it has to be made prompt.

If these people did not make a prompt motion, then they don't have a right to a motion. Where do they get off saying: Okay, I did not make a prompt motion. I am not going to pay any attention to the rules of this Tribunal. I am going to make a motion. I am going to put a return date on that motion. It is not the 30 days as stipulated, and maybe the taxpayer will be deceived and tricked into not getting it.

That upsets me. They apply the laws and the rules as it fits their purposes, and this is the most perfect example of my ten years of frustration dealing with these people. They knew they had to have

30 days return date. They missed the boat, and now they come in and argue on other elements totally forgetting the rules of this Tribunal. End of story.

ADMINISTRATIVE LAW JUDGE: Mr. Fisher, I think what you might find if you researched it further is that the 30 days would not apply to a motion to quash. I think you will find, as you said, the motion to quash must be made promptly. I think you will see cases that hold even up to the date of the appointed hearing are appropriate.

MR. FISHER: Excuse me for being so rude. That is when they did not have ample notice. We had the first group of subpoenas delivered and perfectly, legally submitted to the witnesses on November the 2nd. They had the time to promptly respond. If they were delivered

yesterday, they wouldn't have the time; but that is not the circumstances here. The circumstances are they were, and we have the subpoenas here, the proof of service that they were delivered in well in enough time for them to respond. If they failed to promptly respond, like everybody else they lose their rights.

So let's get on with it and get the witnesses here. How dare they say they got together and decided not to come because they themselves decided it wasn't necessary.

Excuse me. I am very emotional when I get to dealing with these people. I have been living with this matter for ten years.

ADMINISTRATIVE LAW JUDGE: Okay, Mr. Fisher, getting back to the option I gave you, if you both agree, we can start today

to take in the jurisdictional papers and go as far as we can. If you both don't agree of if you both want to wait, I will adjourn it without a date until this matter is resolved in court.

MR. ZALEWSKI: May I request that petitioner be directed to make some offer of proof with respect to the individuals subpoenaed before --

MR. FISHER: I will do that in court.

MR. ZALEWSKI: -- before you grant an adjournment on the matter? Proof of relevance. I will note that Commissioner Wetzler has been subpoenaed, and my understanding after reviewing the file is that he has no knowledge as to the underlying issues of these assessments. Again, this would apply to the other individuals that were subpoenaed as well. I would make my application at this point

that some offer of proof be made before an adjournment is granted. We are ready to go forward. We are ready to present our case.

ADMINISTRATIVE LAW JUDGE: He is entitled to have the subpoenas enforced if the court will enforce them. He will have to tell the Supreme Court Justice why Commissioner Wetzler is important to his case. I don't think that is going to be easy to do. He only started six months ago, five months ago?

MR. ZALEWSKI: I believe it is half a year ago.

ADMINISTRATIVE LAW JUDGE: Mr. Rubenstein, do you remember?

MR. RUBENSTEIN: I don't remember.

MR. ZALEWSKI: Not too long ago.

ADMINISTRATIVE LAW JUDGE: The Justice is going to ask you that, and he has a good point. Why did you subpoena him?

MR. FISHER: I will be prepare to answer that.

ADMINISTRATIVE LAW JUDGE: It looks like no one wants to go forward.

MR. ZALEWSKI: We are ready to go forward with this case.

ADMINISTRATIVE LAW JUDGE: I will only do it with both of you agreeing.

MR. FISHER: Absolutely not. I want the witnesses here.

ADMINISTRATIVE LAW JUDGE: This matter is adjourned.

[Time noted: 2:15 p.m.]

CERTIFICATION

I, Mary Margaret Donavon, a Notary Public in and for the State of New York, do hereby certify:

THAT the foregoing is a true and accurate transcript of my stenographic notes.

IN WITNESS WHEREOF, I have hereunto set my hand this 15th day of December, 1989.

MARY MARGARET DONAVON

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

STEPHEN AND NANCI FISHER

for Redetermination of a Deficiency or Refund of Personal Income Tax and City Personal Income Tax under Articles 22 and 30 of the Tax Law and the Administrative Code of the City of New York for the Years 1977 and 1984

The Division of Taxation has filed an exception to a determination of Administrative Law Judge Robert Mulligan made on December 14, 1989 at the hearing of petitioners Stephen and Nanci Fisher, which denied the Division's request to quash or withdraw certain subpoenas issued by the Division of Tax Appeals (File No.

806534). Petitioners appeared pro se by Stephen Fisher. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

The Division filed an affidavit and brief in support of its exception. The petitioner filed a brief in opposition.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

Issues

I. Whether an Administrative Law Judge has the authority to withdraw or modify subpoenas issued by the Supervising Administrative Law Judge or another Administrative Law Judge of the Division of Tax Appeals.

II. Whether the subpoenas issued to employees of the Division of Taxation and

the Attorney General's Office should be withdrawn or modified.

Findings of Fact

Since a hearing on the merits has not been held in this matter, no documents or testimony are in evidence and no Findings of Fact have been made by an Administrative Law Judge. For the limited purpose of reaching the decision below, the Tribunal has reviewed the papers presented by the parties in the exception and the response to the exception, documents attached to those papers, correspondence related to this case to and from personnel of the Division of Tax Appeals, and the transcript of the hearing held on December 14, 1989 before Administrative Law Judge Robert Mulligan, and has assumed the validity of documents necessary to reach a decision. Any

factual findings made here by the Tribunal are made for the sole purpose of resolving the limited issue before it and do not preclude independent findings of the same facts or additional facts by the Administrative Law Judge at the hearing on the merits.

Factual Background

The petition which is the subject of the proceedings before the Division of Tax Appeals is the amended petition of Stephen and Nanci Fisher dated February 13, 1989. The petitioners appeal from two conciliation orders, both dated November 4, 1988.

The first order is for the tax year 1977 and partially grants petitioners' request for a refund of personal income tax for that year. The petitioners had requested a refund of $1,301.10 on their

tax return for 1977. By a notice dated April 1, 1989, the Division of Taxation allowed a refund in the amount of $205.88 and disallowed the remaining amount of petitioners' refund claim for that year. The petitioners filed a petition to the former State Tax Commission contesting the denial of the refund. This petition was the subject of a default order by the Commission which was subsequently reopened, as a result of which the petitioners received a conference before the Bureau of Conciliation and Mediation Services. This conference resulted in a conciliation order which granted an additional refund in the amount of $540.00. This is the conciliation order from which the petitioners have now petitioned, requesting that the entire

amount of their original refund claim be granted.

The second conciliation order is for tax year 1984 and upholds the statutory notice for that year. The petitioners, in their petition, request the full amount of the refund requested by them for 1984. The Division requests that the statutory notice, which asserts an additional amount due, be upheld. The statutory notice and the petitioners' tax return for 1984 are not among the documents before us. However, they are unnecessary to the decision before us.

The petitioners also request relief relating to interest and penalties. The relief requested appears to be that interest for late payment of refunds be credited to petitioners and that any penalties assessed against petitioners be

offset by penalties assessed against the Division of Taxation for late payment of refunds.

In connection with the petition for hearing, petitioners requested and the Supervising Administrative Law Judge, on October 29, 1989, issued subpoenas to the following persons: Michael Alexander, Director of Litigation; Phylis Jacobowitz, Tax Compliance Agent; August Fietkau, Assistant Attorney General; James Morris, Attorney; Andrew Haber, Senior Attorney; Barbara Burkett, Tax Compliance Agent II; Barry Bresler, Acting Deputy Commissioner and Treasurer; Roderick Chu, Commissioner; and John Langer, Deputy Commissioner for Operations. At the time the subpoenas were issued, an administrative law judge had not been designated to hear the case on its merits. The subpoenas were

returnable on the scheduled hearing date of December 14, 1989. Subsequently, at the request of petitioners, the subpoena for Roderick Chu, the former Commissioner of the Department of Taxation and Finance, was withdrawn and a subpoena for James Wetzler, the current Commissioner of the Department, was issued by Assistant Supervising Administrative Law Judge Daniel Ranalli. The subpoenas were issued pursuant to Rule 3000.6(c) of the Rules of the Tax Tribunal which state:

> "(c) Subpoenas. Upon request, the administrative law judge or presiding officer assigned to the case will issue subpoenas to require the attendance of witnesses at a hearing or to require the production of documentary evidence. In the event that an administrative law judge or presiding officer has not been assigned to the case or the administrative law judge or presiding officer is unavailable, the request to issue subpoenas may be made to the supervising administrative law judge. Subpoenas will be delivered to the person requesting them and service

> thereof will be said person's responsibility. However, an attorney representing any party in a proceeding may issue a subpoena pursuant to section 2302 of the CPLR."

With one exception, the subpoenas are for employees of the Division of Taxation. The remaining subpoena is for an Assistant Attorney General in the Office of the Attorney General.

On November 27, 1989, the Supervising Administrative Law Judge received a motion to quash or withdraw the subpoenas from the Division of Taxation. This motion was returnable on the scheduled hearing date of December 14, 1989, and was made on notice to the petitioners. The Supervising Administrative Law Judge referred to the disposition of the motion to Administrative Law Judge Robert Mulligan, who had by this time been assigned to hear the case on the hearing

date. No papers in response to the motion were submitted by the petitioners. The Administrative Law Judge declined to rule on the motion on the grounds that he lacked the power to vacate, modify or enforce the subpoenas issued by another Administrative Law Judge. The Administrative Law Judge referred the parties to the Supreme Court for resolution of the status of the subpoenas. It was noted at the hearing that the Assistant Attorney General who had been subpoenaed, August Fietkau, had moved in Supreme Court, New York County, to quash the subpoena issued to him. This motion was returnable January 10, 1990. This motion and other motions relating to the issued subpoenas are still pending.

The Division of Taxation excepts to the determination of Administrative Law

Judge Mulligan that he did not have the power to vacate or modify the issued subpoenas, and requests that all of the subpoenas be withdrawn on the grounds that the individuals subpoenaed have no knowledge which is relevant or material to the issues before the Division of Tax Appeals, and as to certain individuals who are attorneys, on the grounds of attorney/client privilege and attorney work product immunity. The Division of Taxation asserts in its exception that the only issues before the Division of Tax Appeals are whether the remaining portion of petitioners' refund for 1977 should be granted, specifically, whether the deductions claimed by the petitioners on their Schedule C should be allowed, and, whether the petitioners properly filed and calculated their tax for tax year 1984.

The Division of Taxation argues that the subpoenas should be withdrawn because none of the individuals subpoenaed can provide testimony or documents as to the validity of petitioners' deductions for 1977 or their filing for 1984.

Petitioners have responded that the rules of the Tribunal require that the subpoenas be issued and that they cannot now be withdrawn by the Tribunal. In addition, petitioners claim that all the individuals subpoenaed do have information necessary to their case.

Opinion

This is the first case involving the issuance of subpoenas by the Tribunal and the authority of the Tribunal to rule on motions to withdraw subpoenas it has issued. The statutory and regulatory

authority for the issuance of subpoenas by the Tribunal is as follows:

Tax Law section 2000(10) provides in relevant part that:

> "The tribunal shall have the power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the proceedings which it is authorized to conduct . . . the tribunal may designate and authorize by resolution, duly entered upon its minutes, officers, administrative law judges and other employees of the division to exercise any of the powers or perform any of the functions provided for in this subdivision. A subpoena issued under this subdivision shall be regulated by the civil practice law and rules."

The regulations of the Tribunal provide in relevant part as follows:

> "(c) Subpoenas. Upon request, the administrative law judge or presiding officer assigned to the case will issue subpoenas to require the attendance of witnesses at a hearing or to require the production of documentary evidence. In the event that an administrative law judge or presiding officer has not been assigned to the case or the administrative law judge or presiding

> officer is unavailable, the request to issue subpoenas may be made to the supervising administrative law judge. subpoenas will be delivered to the person requesting them and service thereof will be said person's responsibility. However, an attorney representing any party in a proceeding may issue a subpoena pursuant to section 2302 of the CPLR." (20 NYCRR 3000.6[c].)

By resolution, the Tribunal has authorized Administrative Law Judges to execute subpoenas for the attendance of witnesses and the production of books, papers and documents relating to the proceedings which the Tribunal is authorized to conduct, and examine them in relation to any matter which it has power to investigate[1].

We deal first with the authority of the Administrative Law Judge to withdraw

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1. The resolution was adopted by the Tribunal effective September 1, 1987.

or modify subpoenas issued by the Division of Tax Appeals.

CPLR section 2304 provides clearly that a motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. However, if the subpoena is not returnable in a court, ". . . a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court."

Here, the Division of Taxation made a motion to the Supervising Administrative Law Judge to quash or withdraw the subpoenas. The Supervising Administrative Law Judge referred the disposition of the motion to the Administrative Law Judge who was assigned to hear the case on the

hearing date. We find such action properly within the discretion accorded the Tribunal to administer the hearing process under its jurisdiction. Accordingly, the motion to withdraw was properly before the Administrative Law Judge and the Administrative Law Judge had the authority to rule on it pursuant to the provisions of CPLR section 2304.

We deal next with the issue of whether the Tribunal has the authority to entertain the Division of Taxation's exception to the determination of the Administrative Law Judge that he did not have the authority to rule on the motion to withdraw the subpoenas made by the Division of Taxation. We conclude that we have such authority.

Tax Law section 2006(7) provides in relevant part that the Tribunal has the

authority "To provide for a review of the determination of an administrative law judge if any party to a proceeding conducted before such administrative law judge, within thirty days after the giving of notice of such determination, takes exception to the determination."

We recognize that Tax Law sections 2006(5) and (7) contain provisions affecting the time when the denial of motions for dismissal and summary judgment can be reviewed by the Tribunal[2]; however, we conclude the Tribunal has jurisdiction over this exception.

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2. The section provides that the determination of the Administrative Law Judge denying either a motion to dismiss or a motion for summary judgment is not subject to review by the Tribunal. The effect of this explicit language is to delay Tribunal review of the action of the Administrative Law Judge on such motion until review of the Administrative Law Judge's determination on the merits, if such review is sought. The Tribunal's regulations at 20 NYCRR 3000.5(a)(5) implement these statutory provisions.

We deal next with the issue of whether the subpoenas should be withdrawn or modified.

We believe we have sufficient information before us to decide whether the subpoenas issued in this case should be withdrawn, modified or sustained. The parties have made extensive presentations in support of their respective positions and in opposition to the presentation made by the other party.

We grant in part the Division of Taxation's request to withdraw the subpoenas here with the specific exception discussed below.

We think it helpful, first, to make clear the nature of the issues raised by petitioners in their petition. The matter before the Division of Tax Appeals is petitioner' refund claim for 1977 and the

deficiency issued to them for 1984. Specifically, the Administrative Law Judge assigned to this case at formal hearing on the merits must determine whether petitioner' refund request for 1977 should be granted or denied and whether petitioners filed the proper returns and paid the correct amount of tax for 1984. The relevant factor is whether the deductions claimed by petitioners on their Schedule C for the year 1977 should be allowed, and whether the petitioners properly filed and calculated their tax for tax year 1984. The issue is whether the subpoenaed witnesses have information necessary to petitioners' presentation of their case on these issues. - The petitioners have presented no facts or arguments that would support subpoenas for any of the individuals here for that part

of the petitioners' case which concerns either tax year 1977 or 1984.

Nowhere is it alleged that any of the named individuals have knowledge of the validity of the petitioners' deductions. As the court in similar circumstances stated in Dworkin Construction Co., Inc. (Sup Ct, Rockland County, Feb. 9, 1987, Kelley, J.), "This information is in petitioner's possession and knowledge" (Dworkin, supra at 2). To seek testimony from witnesses such as Alexander and Fietkau in order to inquire what they know about the petitioners' taxes that the petitioners do not know (Petitioners' List of Witnesses, attached to September 10, 1989 letter from petitioners to Division of Tax Appeals Supervising Administrative Law Judge Andrew Marchese) is inadequate justification (In re Landegger, 54 NYS2d

76). Nor is the testimony of current Commissioner Wetzler as to correspondence by former Commissioner Chu with Congressman Bill Green relevant to the question of petitioners' deductions.

In addition, the original petition for the 1977 refund claim which resulted in a default subsequently vacated by the Division of Taxation is not relevant to this proceeding. Why petitioners' original petition resulted in a default and why that default was vacated is not pertinent to the matter now before the Division of Tax Appeals. Notwithstanding what occurred with petitioners' former petition, petitioners may now submit any evidence they have to support the validity of the deductions taken by them on their 1977 return in order to establish that they are entitled to the claimed refund.

Petitioners' allegation that the testimony of Commissioner Wetzler and others is relevant to their claims concerning interest and penalties is also without foundation. This claim, as embodied in petitioners' petition, appears to be that the petitioners are entitled to interest from the Division of Taxation for late payment of refunds, and that any penalties assessed against petitioners for late payment of taxes should be offset by penalties assessed against the Division of Taxation for late payment of refunds. The Division of Tax Appeals has not authority to assess penalties against the Division of Taxation and, therefore, testimony which is intended to establish that the Division of Taxation deserves to be penalized is outside the scope of the Division of Tax Appeals' jurisdiction. In

addition, this testimony would not be relevant to this proceeding because no penalties have been assessed against petitioner for tax year 1977 as the petitioners filed a return and paid all taxes for that year. The penalties to which the petitioners refer must be for other tax years which are not before the Division of Tax Appeals. The petitioners' request for interest on their refund for 1977 is dealt with below.

Viewed in its most liberal light, petitioners appear to be seeking, through the testimony of some of the subpoenaed witnesses, an accounting of petitioners' tax liability for a series of years before, after and including 1977 and 1984.

Although the Division of Tax Appeals has no jurisdiction to review the amount of or the basis for petitioners' tax

liabilities in years not before it, petitioners' current petition before the Division of Tax Appeals specifically requests the full amount of the original refund claim of $1,301.10. Therefore, the petitioners may properly seek testimony on how the previously granted refund amounts for 1977 were applied. If in fact petitioners have not received credit for some or all of the previously granted refund amounts for 1977, then it would appear that more than the remaining amount of $519.00 has been denied. In addition, if petitioners have not received their refund in a timely fashion, they may be entitled to such interest as the statute allows.-

Therefore, as Deputy Commissioner John Langer is the official whose area of responsibility within the Division of

Taxation would appear to include the persons or units who would have the information relevant here, we sustain the subpoena issued to him. The subpoena is sustained for the limited purpose of responding to questions concerning the previously granted refunds for tax year 1977. The request for production of documents is also limited to this issue. The letter of Michael Alexander dated October 23, 1987 contains an accounting of the petitioners' tax liabilities for a series of years including 1977, and indicates that the previously granted refunds have been credited to a tax liability for the tax year 1976. Other documents before us raise questions as to the origin of a tax liability for that year. Therefore, any explanation that includes a statement that the 1977 refunds

have been credited to a tax liability for a particular tax year must include evidence of the origin of that liability, such as a notice of deficiency or a tax return.

The Division of Taxation may, in the first instance, designate another person or persons who may have the necessary information. Should that person or persons' testimony be deemed inadequate, the petitioners, upon an adequate showing as to relevance, may request that the Administrative Law Judge assigned to this case issue additional subpoenas as he or she deems appropriate (Luddy v. State of New York, 45 Misc 2d 948, 258 NYS2d 303 [Ct. of Claims, 1965]).

Petitioners bear the burden of showing that the testimony provided was inadequate or insufficient before seeking

the testimony of additional witnesses (Rosner v. Maimonides Hospital, 89 AD2d 847, 453 NYS2d 30, 31-32; Instructional Television Corp. v. NBC, Inc., 63 AD2d 644, 404 NYS2d 989; National Reporting, Inc. v. State of New York, 46 AD2d 576, 364 NYS2d 224, 227 [3d Dept 1975]; Besen v. CPL Yacht Sales, Inc., 34 AD2d 789, 312 NYS2d 43; Arett Sales Corp. v. Island Garden Center of Queens, Inc., 25 AD2d 546, 267 NYS2d 623).

This decision does not preclude the issuance of other subpoenas on issues not discussed here by the Administrative Law Judge assigned to this case upon proper application and a showing that the testimony or the production of documents for which a subpoena is sought are relevant to the proceedings.

As it is not necessary to our decision, we do not decide the question to the subpoenas here.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The subpoenas issued to August Fietkau, Michael Alexander, Andrew Haber, James Morris, Phylis Jacobowitz, Barry Bresler, Barbara Burkett and James Wetzler are withdrawn.

2. The subpoena issued to John Langer is sustained.

Dated: Troy, New York
April 19, 1990

John P. Duggs
President

Francis R. Koenig
Commissioner

Narcia T. Jones
Commissioner

Supreme Court—Appellate Division
Third Judicial Department

61656

Decided and Entered: November 21, 1991

In the Matter of STEPHEN FISHER,

Petitioner,

v.

TAX APPEALS TRIBUNAL, et al.,

Respondents.

MEMORANDUM AND JUDGMENT

Calender Date: October 8, 1991

Before Case, J.P., Mikoll, Yesavich Jr., Levine and Crew III, JJ.

Stephen Fisher,
New York City,
petitioner in person.

Robert Abrams, Attorney-General
(Julie S. Mereson of counsel),
Albany, for responsents

Mikoll, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which granted a request of the Division of Taxation to quash certain subpoenas.

The issue presented in this CPLR article 78 proceeding pursuant to Tax Law

§ 2016 is whether petitioner may have judicial review of a decision of respondent Tax Appeals Tribunal to withdraw certain subpoenas it issued where no final administrative determination has been made. In our view the decision challenged may not be reviewed and, therefore, the petition should be dismissed.

Petitioner sought administrative review of an adverse ruling of the Division of Taxation. A dispute developed over the issuance of subpoenas requested by petitioner and a motion to quash or withdraw certain subpoenas was made before the Division of Tax Appeals on the ground that, inter alia, the witnesses subpoenaed could not give any relevant testimony at petitioner's pending hearing. The Administrative Law Judge (hereinafter ALJ)

assigned to the hearing declined to issue or withdraw the subpoenas on the ground that he had no authority to do so. Subsequently, the Division of Taxation filed a notice of exception with the Tribunal, which then ruled that the ALJ did have such authority, granted the Division of Taxation's request and withdrew all but one of the subpoenas. The Tribunal also stated that petitioner could request additional subpoenas upon demonstrating that the testimony desired was relevant. Petitioner then commenced this CPLR article 78 proceeding to annul the Tribunal's determination.

Judicial review of a nonfinal administrative determination is precluded by virtue of CPLR 7801 (1). Regulations of the Department of Taxation and Finance provided that "[a]n order by the

[T]ribunal which does not finally determine all matters and issues contained in the petition * * * shall not be deemed final and conclusive until the [T]ribunal shall have rendered a decision on the remaining matters and issues" (20 NYCRR 3000.5 [a] [5]). Issues raised in the petition, other than the subpoenas, were not addressed and thus the instant proceeding does not seek to review a final determination under the pertinent rules. Moreover, courts have held that where, as here, the power of the agency to issue a subpoena in an administrative proceeding is found in a specific statute, other than the general authority conferred in the CPLR (see, Tax Law § 2006 [10]; 20 NYCRR 3000.6 [b] [3] [c] [1]), the propriety of the issuance or nonissuance of the subpoena is appropriately challenged on

review of the agency's final determination (see, Matter of Irwin v. Board of Regents of Univ. of State of N.Y., 27 NY2d 292, 296-297; see also, Matter of Anonymous v. State Dept. of Health, AD2d [May 9, 1991]). The instant proceeding is therefore premature. We find it unnecessary to reach other issues raised by the parties.

Casey, J.P., Yesawich Jr., Levine and Crew III, JJ., concur.

ADJUDGED that the petition is dismissed, without costs.

ENTER:

Michael J. Novack

Clerk

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of February A. D. 1992

Present, HON. SOL WACHTLER, Chief Judge, presiding.

Mo. No. 171 SSD 12
In the Matter of Stephen Fisher,
Appellant,
v.
Tax Appeals Tribunal et al.,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Donald M. Sheraw
Clerk of the Court

State of New York,
Court of Appeals *At a session of the Court, held at Court of Appeals Hall in the City of Albany on the* fourth *day of* June *A. D. 19*82

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

3-11 Mo. No. 360
In the Matter of Stephen Fisher,
Appellant,
v.
Tax Appeals Tribunal et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sherew
Clerk of the Court

New York State Department of TAXATION and FINANCE

MEMORANDUM

AD-33 (6/76)

Office: Law

Date: May 3, 1982

TO: D. Norman Amyot, Supervisor
Assessment Review

FROM: Jim Morris, Attorney

SUBJECT: Stephen and Nancy Fisher
TAB #2581
Income Tax

Attached is a letter from Stephen Fisher and the enclosure received therewith.

Mr. and Mrs. Fisher were assessed for 1975, 1976, 1977 and 1978 income tax returns not timely filed, and for which the taxes were at least partially unpaid. The petition of Mr. Fisher addressed all these years, as did our answer. Tax

Appeals Bureau scheduled a hearing on the 1975 taxes only. It was for this year -- and only this year -- the undersigned appeared for the Audit Bureau. See attached copy of my memorandum to TAB, and Mr. Nendza's reply thereon.

During the course of the hearing, Mr. Fisher complained he was entitled to a refund for, I believe, 1977. According to research by Audit Evaluation, two refund checks were issued: $1,301.10, reference no. 66371244, and $258.48, reference no. 79789291. As I recall, Mr. Fisher testified he never received the refund check for $1,301.10, and that he ought to get it, or have it applied to any tax liability as may be determined to be due.

TAB has not yet given a decision on the hearing for 1975 taxes held on January 19, 1981.

As you can see from the copy of my reply to Mr. Fisher, I'm directing him to you for assistance in determining what happened to the refund check. I'd appreciate you having the appropriate individual in your Bureau contact Mr. Fisher on this problem.

_____
Attorney

JM/jg
Att.
cc: Allen Caplowaith, Hearing Officer
Stephen Fisher

TAX APPEALS TRIBUNAL
RIVERFRONT PROFESSIONAL TOWER
500 FEDERAL STREET
TROY, N Y 12180 2893

June 14, 1990

Mr. Stephen Fisher
401 East 80th St., Apt. 9C
New York, NY 10021

Re: Stephen and Nancy Fisher
DTA #806534

Dear Mr. Fisher

This is in response to your letter of May 27, 1990 requesting a clarification of the decision issued by the Tax Appeals Tribunal on April 19, 1990, in the above matter. The Tax Appeals Tribunal does not think it appropriate to comment further on a case once a decision has been issued. It is a function of the court system to determine the meaning of a decision should there be any questions regarding clarity.

In this particular case, it is especially inappropriate for the Tribunal to comment, in that there is ongoing litigation concerning the subpoenas that were the subject of the decision.

Any further questions you may have regarding the status of this appeal should refer to files reference number DTA 806534 and be directed to my attention.

Very truly yours,

Roberta Moseley Nero
Secretary to the Tax
Appeals Tribunal

cc: Law Bureau - Andrew Zalewski, Esq.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

- Amendment V
- Amendment XIV (Section 1)

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.